

FILED

SEP 25 1940

CHARLES ELMORE DROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 461

CATAHOULA BANK,

Petitioner,

vs.

LEON KIRBY, DEBTOR.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

**WOOD H. THOMPSON,
THOS. W. LEIGH,**
Counsel for Petitioner.

INDEX.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Reasons relied on for the allowance of the writ	6
Prayer for writ	8
Brief in support of petition for writ of certiorari	11
Opinion of the court below	11
Jurisdiction	11
Statement of the case (see statement in petition)	13
Federal statute involved	14
Specifications of error	14
Summary of argument	16
Argument	17
Point I	16
Point II	29
Point III	38
Point IV	46
Conclusion	50

TABLE OF CASES CITED.

<i>Baker v. Smith</i> , 44 La. Ann. 925, 11 So. 585	25
<i>Bell v. Leiendecker</i> , 187 La. 1, 174 So. 89	25
<i>Board of Trade v. Johnson</i> , 264 U. S. 1-16, 68 L. Ed. 533, 44 Sup. St. Rep. 232	17
<i>Brooks v. Broussard</i> , 136 La. 380, 67 So. 65	23
<i>Calderwood v. Calderwood</i> , 23 La. Ann. 658	25
<i>Catahoula Bank v. Leon Kirby, Debtor</i> , 112 F. (2d) 124	11
<i>Continental Illinois National Bank & Trust Co. v. C. R. I. & P. R. Co.</i> , 294 U. S. 638-685, 79 L. Ed. 1110, 55 Sup. Ct. Rep. 595	41
<i>Erie Railroad Co. v. Tompkins</i> , 304 U. S. 64-92, 82 L. Ed. 1188, 58 Sup. Ct. Rep. 817	17
<i>Gautreaux v. Harang</i> , 190 La. 1060, 183 So. 349	25
<i>Henkel v. Mix</i> , 38 La. Ann. 271	23

	Page
<i>Hepburn v. Griswold</i> , 8 Wall. 603-639, 19 L. Ed. 513.	40
<i>Home Building & Loan Assn. v. Blaisdell</i> , 290 U. S. 398-483, 78 L. Ed. 413, 54 Sup. Ct. Rep. 231	39
<i>Lafayette Life Ins. Co. v. Lowman</i> , 79 F. (2) 887	42
<i>Latialais v. Breaux</i> , 154 La. 1006, 98 So. 620	25
<i>Marbury v. Colbert</i> , 105 La. 467, 29 So. 871	25
<i>McCulloch v. Maryland</i> , 4 Wheat. 316, 4 L. Ed. 579	42
<i>Swift v. Tyson</i> , 16 Pet. 1, 10 L. Ed. 865	17
<i>Tangelet v. Chopin</i> , 155 La. 752, 99 So. 587	26
<i>Ware v. Morris</i> , 23 La. Ann. 665	25
<i>Wright v. Union Central Life Ins. Co.</i> , 304 U. S. 502, 82 L. Ed. 1490, 58 Sup. Ct. Rep. 1025	13, 32
<i>Wright v. Union Central Life Ins. Co.</i> (Mem. Dec.), 303 U. S. 630, 82 L. Ed. 1090, 58 Sup. Ct. Rep. 644	13
<i>Wright v. Union Central Life Ins. Co.</i> , 91 F. (2d) 894	43

STATUTES CITED.

Federal:

Judicial Code, Sec. 240, as amended by Act of February 13, 1925, 28 U. S. C. A. 347 (43 Stats. 938)	11, 13
National Bankruptcy Act, as amended:	
Sec. 24 (c), 11 U. S. C. A. 47	12, 13
Sec. 24 (a) and (b), 11 U. S. C. A. 47	12
Sec. 75 (n), 11 U. S. C. A. 203	6, 15
Senate Committee on Judiciary Report (S. R. 985)	31

Louisiana:

Louisiana Revised Civil Code:

Art. 2462	18
Arts. 2567-2575	6, 19
Art. 2573	46
Arts. 3133-3135	21
Arts. 3176-3179	21, 22

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 461

CATAHOULA BANK,

Petitioner,

vs.

LEON KIRBY, DEBTOR.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

MAY IT PLEASE THE COURT:

The petition of Catahoula Bank respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The manner in which this litigation arises is as follows:

On February 28, 1938, Leon Kirby, respondent herein, sold, conveyed, and transferred to the Catahoula Bank, petitioner, by a notarial act of sale, which appears in full at

pages 11-14 of the Record, the property which is involved in this litigation consisting of some four hundred eighty (480) acres of land in Catahoula Parish for the consideration of the assumption by the Bank of certain encumbrances against the property aggregating \$8,344.35 and consisting of a mortgage to the Federal Land Bank upon which the amount due at the time of the transfer, including delinquent interest, was acknowledged to be \$6,344.35 and a second mortgage in favor of the vendee bank in the principal sum of \$2,500.00 upon which the unpaid balance then past due was acknowledged to be the sum of \$2,500.00.

On the same day, February 28, 1938, Leon Kirby and the Catahoula Bank entered into a separate written contract (R. 14-17) wherein it was acknowledged that in purchasing the property the Bank had assumed the payment of the Federal Land Bank mortgage of \$6,344.31 and the payment of the indebtedness to itself amounting to \$2,500.00 and in addition was required to pay the sum of \$1,066.19 in order to secure the cancellation of certain judgment encumbrances affecting said property, the whole of which, amounting to the total sum of \$9,910.50, was acknowledged to be the consideration for said transfer and sale.

By this contract the parties further agreed that the property should be leased and rented to Leon Kirby for the calendar year 1938 in consideration of his agreement to pay all taxes accruing against said property for that year, to preserve and properly care for said property during the term of the lease, and to deliver full and complete possession thereof to the Bank on December 31, 1938. In this lease agreement Leon Kirby specially waived any and all legal notices to vacate said property on December 31, 1938 and specially acknowledged the Bank's absolute right, and irrevocably authorized the Bank to do so, to enter upon and take full and complete possession of said property on and after January 1, 1939, without further notice or legal

process and specially granted the Bank full and complete immunity for any damage to himself because of such entry and possession.

In this written contract it was further agreed that during the life of the lease therein granted and until December 31, 1938, the Bank gave and granted to Leon Kirby, his heirs and assigns the right and option to repurchase the aforesaid property and bound and obligated itself to sell the same to him, his heirs or assigns upon the payment to it by him of the full amount of the indebtedness enumerated in that act (viz: \$9,910.50) which had been assumed by the Bank as the purchase price in the aforesaid sale, together with all interest upon said amount at the rate of eight (8%) per cent per annum from January 1, 1938, together with all costs and expenses incurred and paid by said Bank on said property on and after the date of this instrument.

The intended purpose of this agreement was recited as being to permit the said Kirby to repurchase said property at any time on or before December 31, 1938, upon his reimbursing the Bank all money invested in said property by the Bank together with interest, as aforesaid, thereon.

It was further agreed, however, that in effecting a repurchase of said property within the period stipulated by that contract, said Kirby would be permitted to assume as part of the consideration to be paid by him any unpaid balance that might be due and owing on the mortgage encumbrance to the Federal Land Bank if the same had not been paid and discharged in full, but it was specially provided that all other considerations should be paid in cash.

This contract concludes with the specific provision that the option and right to repurchase, as therein granted, should expire on and after December 31, 1938, after date.

Leon Kirby did not comply with any of the obligations imposed upon him by this contract nor avail himself of any of the rights granted him therein but on or about December

20, 1938, instituted his proceeding for relief under Section 75 of the National Bankruptcy Act and in doing so included in the schedules of his property the particular tract of 480 acres which he had deeded to the Bank in this deed of February 28, 1938, and which he was then occupying under the lease agreement included in their contract of the same date. And in an effort to vindicate the claim which he was making to this property he filed a petition in which he made application for an order granting him an extension of time within which to redeem this property from the Bank for the period of time necessary for him to avail himself of the provisions of Section 75 of the Bankruptcy Act, and sought to enjoin and restrain the Bank from interfering with him or ejecting him from said property or disposing of the same pending his proceeding under Section 75. This petition is copied in full on pages 4-6 of the Record.

On or about February 22, 1939, the Bank filed an answer to this application wherein it denied Kirby's right to the relief which he was seeking and, having annexed to its answer copies of the original deed and the original contract hereinabove referred to, it took the position that all rights which Kirby might once have exercised under this contract had expired on December 31, 1938, and that his application should be dismissed and his demands as presented therein rejected.

The Bank in its answer further specially averred that a contract such as is here presented does not fall within the purview of Section 75 of the National Bankruptcy Act which purports to authorize the extension by the courts of periods of redemption and further pleaded that if said Act were intended by Congress to apply to a contract of this nature, then in so doing the Congress had exceeded its bankruptcy powers and that the provisions of Section 75 to that extent were unconstitutional as being violative of the due process

and other clauses of the Federal Constitution. The Bank's answer appears in full at pages 7-11 of the Record.

On these issues the application was heard.

The hearing before the Supervising Conciliation Commissioner which was held on March 4, 1939 resulted in a written report made by the Supervising Conciliation Commissioner and rendered on June 12, 1939 wherein he denied the Bank's contentions and recommended that the application made by Kirby be allowed as prayed for. This report appears in full in the record at pages 1-28 and in this report the Supervising Conciliation Commissioner set out in full Kirby's application, the Bank's answer, and the deed and contract which are the subject of this litigation, all of which have been hereinabove referred to in the course of this statement.

Exceptions to this report and these recommendations were duly taken by the Bank and in due course the matter was reviewed by the District Judge who on September 7, 1939 by written opinion (R. 29-30) adopted in full the findings of fact and recommendations as to the law which had theretofore been made by the Commissioner.

Judgment was duly signed on October 23, 1939 (R. 30-32) and an appeal was taken by the Bank to the United States Circuit Court of Appeals for the Fifth Circuit.

In an opinion handed down May 28, 1940 (R. 42-45) the Circuit Court of Appeals affirmed the judgment appealed from. An application for rehearing (R. 46-49) was duly filed and on July 8th, 1940 an order was entered (R. 50) denying this application.

Petitioner claims error in the opinion and ruling of the Circuit Court of Appeals, as well as of the District Court, and seeks relief through the supervisory jurisdiction of this Court.

B.

Reasons Relied On for the Allowance of the Writ.

In invoking the supervisory jurisdiction of this Court and seeking a review by this Court of the opinion and judgment of the United States Circuit Court of Appeals for the Fifth Circuit, your petitioner shows:

1. That in reaching its decision the Circuit Court of Appeals failed to follow the Statutory law and jurisprudence of Louisiana in construing the contract of February 28, 1938 and determining the respective rights and obligations of the parties thereunder, and on the contrary placed upon that contract a construction which is wholly unknown to the Louisiana law.

2. That under the Statutory law and jurisprudence of Louisiana, which, under the Constitution and Statutes of the United States as construed by the jurisprudence of this Court, the courts of the United States are bound to follow, the Circuit Court of Appeals was bound to hold that the contract of February 28, 1938 constitutes either an option to repurchase or the reservation of the Statutory right of redemption provided for by *Article 2567, et seq. of the Revised Civil Code of Louisiana* with the necessary consequence *in either event* that its term cannot be extended under the Bankruptcy power of Congress and under the provisions of the National Bankruptcy Act, as amended, particularly Section 75 (n) thereof.

3. That in thus failing to follow the Statutory law and jurisprudence of Louisiana, and in thus giving to the contract now in question an anomalous character, not recognized or sanctioned by the Louisiana law and jurisprudence, and in denying to the contract any effect, either as an option to repurchase or as a reservation of the Statu-

tory right of redemption, the said Circuit Court of Appeals has placed the redemptive rights accorded by the contract within a category which is not supported by any provision of the Louisiana law, Statutory or otherwise, and has, therefore, decided an important question of local law in a way which is in direct conflict with applicable local decisions.

4. That the Circuit Court of Appeals erred in holding that the contract of February 28, 1938 and the rights and obligations of the respective parties thereto fall within the intendment of the provisions of the National Bankruptcy Act, as amended, and particularly Section 75 (n) thereof, and that the extension of the period of redemption as provided for by Section 75 (n) of the National Bankruptcy Act was intended to apply to a contract such as is now under consideration.

5. That if by the terms of the National Bankruptcy Act, as amended, and particularly Section 75 (n) thereof, the Congress intended to authorize the extension of the term of, or the enlargement, alteration, or abrogation of any of the contractual rights conferred by such a contract as is now in question and to permit an interference with petitioner's right to the possession of the property now in litigation, then in such event the Congress of the United States has gone beyond and exceeded the bankruptcy power conferred upon it by the Federal Constitution, and as a consequence the National Bankruptcy Act, as amended, and particularly Section 75 (n) thereof, insofar as it might purport to authorize the extension of the term of said contract, or any enlargement or alteration of its provisions, or any interference with petitioner's right to retake possession of the property covered by said contract, is in direct conflict with the Constitution of the United States, and particularly Amendment V thereof, and constitutes the tak-

ing of your petitioner's property without due process of law; and the United States Circuit Court of Appeals erred in not so holding.

6. That in any event the Circuit Court of Appeals erred in holding that the leasehold rights accorded Leon Kirby by said contract of February 28, 1938, which was admittedly the sole title under which Kirby enjoyed *possession* of the land in question, could be extended under the provisions of the National Bankruptcy Act, as amended, and in holding that petitioner's right to retake possession of the land in question upon the expiration of said lease on December 31, 1938 could be interfered with or deferred by the Bankruptcy Courts under the powers conferred by the National Bankruptcy Act, as amended, particularly Section 75 (n) thereof.

7. That from the above reasons it will be readily seen that the Circuit Court of Appeals in this case has decided, as we submit erroneously, important questions of Federal law which have not been, but should be, settled by this Court.

8. That your petitioner re-urges, and re-affirms in this petition all of the assignments of error urged on its original appeal, as shown in the statement of points relied on, appearing at pages 37-40 of the record, as well as those urged in its petition for rehearing, as shown on pages 46-49 of the record.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the said United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named,

a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9433, *Catahoula Bank, Appellant*, versus *Leon Kirby, Debtor, Appellee*, and that said decree and judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

CATAHOULA BANK,
By WOOD H. THOMPSON,
THOS. W. LEIGH,
Counsel for Petitioner.